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IN THE
Supreme Court of the United States

OCTOBER TERM,

CHARLES BROWN, ET AL.,
Petitioners,

v.

DAVID HOVATTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL CEMETERY, CREMATION, AND FUNERAL ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE INTERNATIONAL CEMETERY, CREMATION, AND FUNERAL ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus is the International Cemetery, Cremation, and Funeral Association ("ICCFA"). Founded in 1887, ICCFA is a voluntary trade association with over 7,200 members, including non-profit, for-profit, religious and municipal cemeteries, funeral homes,

crematories, and memorial retailers.[1] The ICCFA's activities include tracking federal and state legislation affecting the death care industry. ICCFA promotes consumer choice, the prearrangement of funeral and burial decisions, and open competition among providers of death care services. At least 97% of ICCFA's members are corporations, each of whom is effectively barred from entering the Maryland death care market as a result of Maryland's unique statute prohibiting corporate ownership of funeral homes.

ICCFA is concerned that the Maryland Morticians and Funeral Directors Act (the "Maryland Morticians Act"), Md. Code Ann., Health Occ. § 7-101, et. seq., impedes the free flow of commerce and adversely impacts the interests of both ICCFA members and consumers. ICCFA also fears that the decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") provides protectionist interests with a blueprint for stifling the competitive national market for death care that very gradually has begun to emerge in recent decades.

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[1] Amicus curiae notes that counsel of record for all parties received notice of ICCFA's intention to file this brief. This brief is filed with the written consent of all parties. Pursuant to Sup. Ct. R. 37.6, amicus notes that no part of this brief was authored by counsel for any party. Amicus also notes that no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or entity other than amicus or its members made such a monetary contribution.

SUMMARY OF ARGUMENT AND BACKGROUND FACTS

A. Factual Background

In the United States, the death care industry, which provides funeral, burial, crematory, memorialization and related services, generates gross revenues conservatively estimated at $14 billion per year.[2] Maryland licensed funeral homes and the fifty-eight grandfathered Maryland corporations collectively share Maryland's portion of this substantial annual revenue.

Until almost the end of the twentieth century, the death care industry in the United States consisted almost entirely of small, independent, family-owned businesses operating out of a single location and sometimes serving customers over multiple generations. These small businesses often operated in a less-than-competitive market. Consumers had to select funeral homes, cemeteries, and other vendors quickly in the traumatic days after the death of a family member, leaving little time or inclination for comparison shopping. Moreover, there often were few competitors in many markets, and would-be competitors may have informally respected each other's *de facto* territories.[3]

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[2] U.S. Census Bureau, *Industry Statistics Sampler, NAICS 8122, Death Care Services* (2002), *at* http://www.census.gov/econ/census02/data/industry/E8122.HTM.

[3] *See* FTC, *Funeral Industry Practices: Final Staff Report to FTC and Proposed Trade Regulation Rule* (Bureau of Consumer Protection 1978) (hereinafter "*Final Staff Report to FTC*"), *available at* http://www.ftc.gov/bcp/rulemaking/funeral/finstaffrept.pdf.

Beginning in approximately the 1980's, however, the death care industry gradually experienced significant change. Some changes increased consumer choice as new service providers entered the market and existing providers expanded the range of services they offered. For example, providers began combining functions to allow "one-stop shopping" for consumers of death care. Cemeteries acquired or established funeral homes and crematories, while funeral homes established crematories and acquired cemeteries. Casket manufacturers and casket retailers began selling directly to consumers, bypassing funeral homes.[4]

Other changes increased consumer knowledge and encouraged competition. For example, the Federal Trade Commission sought to empower and protect consumers by the promulgation of its "Funeral Rule," a regulation established for the express purpose of ensuring that consumers receive information necessary to make informed purchasing decisions, and to lower existing barriers to price competition in the market for funeral goods and services.[5]

Perhaps most significantly, changes occurred in the ownership of death care providers. Many firms established operations at multiple locations and in multiple states, sometimes leading to large national or international enterprises. As one scholar has

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[4] *See* GAO, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule, Report to Congressional Requesters*, GAO/GGD-99-156 (1999), *available at* http://www.gao.gov/archive/1999/gg99156.pdf.

[5] 16 C.F.R. pt. 453; *see also* 47 Fed. Reg. 42,260 (Sept. 24, 1982).

noted, "[w]here most deathcare establishments had been relatively small and locally owned (or, at most, small chains), the 1990's saw a rapid growth of mega-corporations with nationwide and international holdings."[6] For example, by the mid-1990's, Service Corporation International ("SCI") reportedly operated 2,882 funeral home locations, 345 cemeteries and 150 crematoria.[7] Similarly, the Loewen Group, Inc. ("Loewen") grew within a decade from 42 funeral homes and one cemetery in 1987 to "950 funeral homes and 289 cemeteries throughout Canada, the United States and Puerto Rico."[8] Stewart Enterprises, Inc. ("Stewart") reportedly acquired in fiscal year 1996 alone "134 funeral homes and 15 cemeteries in 22 international and domestic markets."[9] In short, outside of Maryland, the death care industry has been significantly penetrated by interstate corporations.

As in other industries, use of the corporate form has been an indispensable prerequisite to the interstate growth of the death care industry. Indeed, regardless of whether they are small family-run operations or part of the operations of a large national chain, the majority of funeral homes in the

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6 William G. Whittaker, *Funeral Services: The Industry, Its Workforce, and Labor Standards, CRS Report for Congress* 6 (2005), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/206.

7 *Id.* at 8.

8 *Id.* at 9. Loewen later became the Alderwoods Group and was subsequently acquired by SCI.

9 Thus, it is no longer true to speak of a "Mom and Pop" industry comprised of small independent providers. Rather, the industry is becoming increasingly competitive, diverse and interstate in character.

United States are owned by corporations.[10] As the District Court recognized, operating a business as a corporation has several well-known advantages:

- Free transferability;
- Limited liability;
- Tax advantages;
- Perpetual existence; and
- Superior ability to raise capital through stock sales.[11]

Capitalizing upon these advantages, corporations operating across state lines have helped transform the death care industry into a more competitive and nationwide industry. While barriers to entry and abusive practices still exist, it is far different from the localized, fragmented market it was even twenty years ago.

Nevertheless, while the death care industry as a whole has made significant strides towards the establishment of a free and competitive national market, local protectionist obstacles still impede the flow of commerce. As the Federal Trade Commission's Bureau of Consumer Protection has stated:

> [M]any restrictive state regulations operate not to provide badly-needed

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[10] *See Brown v. Hovatter*, 516 F. Supp. 2d 547, 554 (D. Md. 2007) (noting that *at least* "fifty-one percent of funeral homes nationwide are registered in the corporate form.") (hereinafter "*Brown I*"). As the District Court explained, fifty-one percent represents the lowest possible percentage of incorporated funeral homes; the actual percentage might well be higher. *Id.* at n.11.

[11] *Id.*

> information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition .... Many of the laws create barriers to entry into the occupation and to the offering of low cost funeral services.[12]

These protectionist measures take many forms. Historically, some states have prohibited cemeteries from providing funeral home services.[13] Others have forbidden cemeteries from selling monuments.[14] And, in at least four states, only licensed funeral directors may sell caskets.[15] While some protectionist statutes have been invalidated by courts,[16] many remain on the books to the detriment of consumers.

B. Regulatory Capture in Maryland

The Maryland death care market, like the national market, long has been plagued by protectionism and barriers to entry that decrease competition, increase prices and burden the free flow of interstate commerce. The Maryland Morticians Act's

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[12] *Final Staff Report to FTC* at 103.

[13] *See* Mich. Comp. Laws Ann. § 339.1812; N.Y. Gen. Mun. Law § 166; Conn. Gen. Stat. § 20-230; 24 Del. Code Ann. § 3119; 32 Me. Rev. Stat. Ann. § 1403; N.H. Rev. Stat. Ann. § 325:48; R.I. Gen. Laws § 5-33.2-9; Wis. Stat. § 157.067.

[14] *See, e.g.*, Mass. Gen. Laws ch. 114, § 430; N.J. Stat. Ann. § 45:27-16.

[15] La. Rev. Stat. Ann. §§ 37:831, 37:848(c); Okla. Stat. Ann. tit. 59, §§ 396.2(2)(d), 396.2(10) & 396.6; S.C. Code Ann. §§ 40-19-20(12), 40-19-20(18) & 40-19(30); Va. Code Ann. §§ 54.1-2800 & 54.1-2805.

[16] *See, e.g., Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000).

prohibition on corporate ownership is one such device. As the District Court accurately noted, "[t]here is no question that the [Maryland] Morticians Act, and especially the provision restricting corporate ownership, is at a minimum a protectionist piece of legislation."[17] In practice, the statute effectively insulates Maryland from the emerging competitive and nationwide death care market by preventing interstate providers – providers who necessarily are formed as corporations – from competing with Maryland licensed entities.

As Todd Zywicki, former Director of the FTC's Office of Policy Planning explained, the Maryland Morticians Act appears to be:

> an effort to create governmentally imposed barriers to entry in the funeral home industry and thereby to transfer wealth to a discrete, well-organized interest group at the expense of consumers of funeral home services and the public at large. The result of this regulation is reduced competition in the provision of funeral home services and higher prices and reduced choice in funeral home products and services for consumers.[18]

Mr. Zywicki's opinions are supported by the empirical evidence. Only twenty-one percent of funeral homes in Maryland are owned by corporations, as opposed to at least fifty-one percent registered as corporations nationwide.[19] This is not

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[17] *Brown I*, 516 F. Supp. 2d at 561.

[18] *Id.* at 553.

[19] *Id.* at 554.

surprising given that, as a result of the Mortician's Act, non-Maryland entities who desire to enter the Maryland market must pay a premium of $150,000 to $200,000 to acquire one of the fifty-eight grandfathered corporate licenses, assuming such a license is even available for sale.[20] It also is unsurprising that, as a result of decreased competition resulting from this barrier to entry, Maryland consumers pay an estimated $800 more for a funeral than the national average.[21]

Repeated efforts have been made to repeal such protectionist legislation in Maryland and allow more open competition in the Maryland death care industry. These reform efforts, however, consistently have been opposed and thwarted by the Maryland State Board of Morticians (the "SBM") and the State Funeral Directors Association (the "MSFDA"). The former regulatory body is comprised of eight licensed morticians and four consumer members.[22] Seven of the eight morticians on the SBM also are members of the MSFDA.[23] Moreover, at the time of the District Court's decision, two of the members of the SBM had a direct interest in maintaining the ban on corporate ownership.[24] Thus, the regulators who enforce Maryland's regulation of the death care industry, and who have prevented the repeal of the Maryland Mortician Act's ban on corporate ownership, hardly are disinterested observers.

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20 *Id.* at 553.

21 *Id.* at 554.

22 *Id.* at 553.

23 *Id.*

24 *Id.*

Indeed, the Maryland funeral industry presents a classic case of what public choice economists call "regulatory capture."[25] Regulatory capture occurs when members of a regulated occupation come to dominate the regulatory and law-making process in their field.[26] Members of a regulated industry will devote considerable resources over time to achieving control of the regulated industry to exclude competitors and charge artificially high prices. In fact, the pressure for regulating an occupation typically comes from within the occupation itself, and this phenomenon is especially pronounced in the area of licensed professions.

ICCFA submits that the Maryland Morticians Act is not a statute that protects consumer interests or furthers some other legitimate regulatory purpose. Instead, it represents a transparent barrier to entry adopted and maintained as a result of "regulatory capture" in Maryland.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION UNREASONABLY BURDENS INTERSTATE COMMERCE AND REFLECTS FLAWED ASSUMPTIONS REGARDING THE MODERN FUNERAL SERVICES INDUSTRY

The Fourth Circuit's decision is significant in its own right for its detrimental impact both upon Maryland consumers and upon corporations seeking to enter the Maryland death care market. The case

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[25] *See id.*

[26] *Id.*

assumes far greater significance, however, when viewed against the backdrop of the national death care industry – an industry historically plagued by anti-competitive behavior and barriers to entry but that has increasingly become more competitive and national in character. It is reasonable to assume that those opposed to competition will seize upon the Fourth Circuit's decision as a "how-to" manual for enacting legislation to stifle emerging interstate competition in the death care industry, and perhaps in other industries as well. Such a result would disserve the public interest and be inconsistent with the Commerce Clause. ICCFA therefore urges the Court to grant the Petition and reverse the Fourth Circuit's decision.

A. The Death Care Market No Longer is a Localized Market

As Petitioners argue, the Fourth Circuit's attempt to carve-out an exception to the Dormant Commerce Clause for regulations affecting only the flow of capital, but not goods or services, is contrary to decisions in other Circuits. But of perhaps equal importance, the Fourth Circuit's decision also fails to recognize that the interstate flow of goods and services in the modern funeral industry is necessarily and directly impacted by regulations impeding the flow of capital.

The Fourth Circuit mistakenly based its opinion on the false proposition that the "Morticians Act purports to regulate an industry that is inherently local, not interstate, in nature."[27] Starting from this flawed premise, the Court of Appeals goes on to

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[27] *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009) (hereinafter "*Brown II*").

conclude that the Morticians Act "does not address, nor thereby affect, the flow of any goods or articles of commerce across state lines," and that "the burden of this regulation . . . falls on Maryland consumers, not on interstate commerce."[28] In short, the Fourth Circuit analyzed the Maryland Morticians Act as if it regulated an industry composed entirely of local businesses providing a purely local service to Maryland consumers. But its anachronistic analysis is belied by significant developments in the death care industry that have taken place over the last few decades.

Although the Fourth Circuit's description of the death care market as inherently localized may have been accurate in 1970, or perhaps even in 1990, it no longer holds true today. As explained above, changes in the last half-century have transformed the death care industry outside of Maryland into an emerging competitive and interstate market. Consolidation within the industry means that, outside of Maryland, small family-owned businesses now face competition from national chains such as SCI and Stewart, as well as from numerous relatively small firms operating in more than one state. The Maryland Morticians Act unreasonably and intrusively burdens this interstate competition by excluding corporate participants from the Maryland market. What the Fourth Circuit characterized as a restriction merely on the flow of capital necessarily translates into a significant burden on the interstate flow of funeral goods and services.

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[28] *Id.* at 364-366; *see also id.* at 364 ("the service provided through the practice of mortuary science begins and ends within the State.").

The Fourth Circuit also misconceives the interstate nature of commercial transactions in today's death care industry. Obviously, Maryland funeral homes are directly involved in the sale of many goods in interstate commerce – caskets being the most obvious example. But the payment for death care also necessarily involves interstate commerce. Maryland consumers pay for death care through interstate credit card transactions. Equity funds and bonds located outside Maryland are used to fund funerals paid in advance of need. Thus, the death care and goods provided in Maryland necessarily involve interstate commercial transactions.

B. By Accepting Purely Speculative Benefits as Justification for the Corporate Ownership Ban, the Decision Below Invites the Adoption of Further Legislation Burdening the Flow of Commerce

ICCFA also urges the Court to review the Fourth Circuit's decision because of the dangerous precedent it provides to protectionist interests in other states. The Fourth Circuit accepted at face value Maryland's contention that the prohibition on corporate ownership serves the state's interest of insuring accountability. [29] As the District Court noted, however, this claim is flatly belied by the State's exemption of fifty-eight grandfathered corporations

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[29] *See, e.g., Brown II*, 561 F.3d at 367-68 ("[W]e conclude that the Morticians Act's incidental burden on interstate commerce is not excessive and is justified by the very real benefits of protecting the public health, safety and welfare by encouraging familiarity of the owner of a funeral business with the day-to-day workings of that business and creating accountability to regulators and clients.").

from the ban.[30] Thus, Maryland's "claims of consumer protection concerns appear to be no more than 'entirely speculative.' "[31]

If the Fourth Circuit's decision is permitted to stand, other jurisdictions remain free to adopt regulations based on speculative benefits unsupported by empirical evidence. Moreover, these efforts could extend beyond the death care industry. For example, a state legislature could decide to protect independent "Mom and Pop" restaurants from competition with national chains by prohibiting corporate ownership. The ostensible purpose of such regulation would be to insure greater accountability to public health officials of those involved in the preparation and sale of food to consumers. Under the Fourth Circuit's reasoning, this form of regulation would be upheld despite its significant burden upon interstate commerce and blatant protectionist agenda.

III. The Fourth Circuit's Decision is Inconsistent with Federal Regulation of the Death Care Industry

Decisions of this Court long have recognized that the negative and affirmative commerce clauses are equal in scope. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-574 (1997). Federal regulation of the death care industry therefore should be co-extensive with the protections of the dormant commerce clause. However, by concluding that the Maryland Morticians Act is a "local regulation of a localized profession where

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30 *Brown I*, 516 F. Supp. at 563.

31 *Id.*

services are performed for clients entirely in Maryland," [32] the Fourth Circuit implies that Congress lacks the authority under its affirmative commerce clause power to regulate the local funeral industry. This is both unfortunate and contrary to longstanding federal regulatory history.

In fact, Congress long has exercised its right under the commerce clause to regulate the funeral industry. In particular, the Federal Trade Commission's Funeral Rule, which went into effect on April 30, 1984, comprehensively regulates the disclosures made to consumers when making death care purchasing decisions.[33] For example, the Funeral Rule specifies that it is an unfair or deceptive act or practice for a funeral provider to: (1) fail to furnish consumers with accurate price information disclosing the costs of each funeral good or service used in connection with the disposition of dead bodies; [34] (2) require consumers to purchase a casket for direct cremations; [35] (3) condition the provision of any funeral good or service upon the purchase of any other funeral good or service;[36] or (4) embalm the deceased for a fee without authorization.[37] The rule also sets forth required price and information disclosures.[38] Following the Fourth Circuit's flawed analysis, the areas of funeral services regulated by

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32 *Brown II*, 561 F. 3d at 366.

33 *See* 16 C.F.R. pt. 453.

34 16 C.F.R. § 453.2(a).

35 *Id.* § 453.4(a).

36 *Id.* § 453.4(b).

37 *Id.* § 453.5(a).

38 *Id.* §§ 453.2, 453.3.

the Funeral Rule could be interpreted as local and not interstate in nature, thereby rendering the Funeral Rule unenforceable in the Fourth Circuit. ICCFA believes this could not have been the intention of the Fourth Circuit, but that only a decision by this Court can remove any uncertainty caused by the decision below.

CONCLUSION

For the reasons set forth above, Amicus ICCFA respectfully urges the Court to grant certiorari and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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